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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

AERONAUTICAL RADIO, INC., ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA

and the

FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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February 11, 1960

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The central premise of the government's opposition brief is that the Federal Communications Commission did not actually do what its order says it did. Thus, the government attempts to shift responsibility for the Commission's order onto the President in order to clothe it with the raiment of executive privilege. (Opp. Br. p. 9). But the record is clear that the President neither authorized nor directed the Commission to undertake the frequency reallocation at issue in this case. Moreover, the Office of Civil and Defense Mobilization could not have done so on the

President's behalf as the Court of Appeals erroneously "presumed" because OCDM simply does not have authority to allocate or reallocate radio frequencies. (see Pet. pp. 12-13)

It is for this reason that the government's brief conveys the false impression that presidential action is being contested here even though the record is equally clear that petitioners have not objected to the assignment of the frequencies in controversy to government stations either for treaty authorized radionavigation devices or for non-treaty radiopositioning stations. Indeed, petitioners specifically urged before the Commission that it was technically feasible for the 8800 mcs band to be shared by government and non-government users alike. (JA 61)

What petitioners do challenge is the Commission's termination of treaty allocations and the resulting destruction of rights intended to be secured under both statutory and treaty law. For if the Commission may validly terminate treaty allocations, as approved by the court below, all rights of licensed access to the radio spectrum are condemned to agency caprice. This is so because the allocation process, *i.e.*, the division of the radio spectrum among authorized classes of service, *e.g.*, radionavigation, broadcasting, is prerequisite to the licensing process, *i.e.*, the assignment of discrete frequencies to particular stations. Since the Commission will not consider applications, grant station licenses, or renew outstanding station licenses which do not conform with approved frequency allocations, it follows that the power to cancel an allocation carries with it the destruction of all rights of licensed use of that portion of the radio spectrum. (see Pet. pp. 4 n. 1, 8)

Finally, the opinion of the Court of Appeals amply corroborates petitioners' contention that by disclaiming responsibility for the consequences of its order and by denying its statutory obligation to make an independent public interest determination the Commission has stripped itself of the regulatory authority enacted by Congress. The court's repeated references to the President's prerogatives as chief executive and commander in chief, as well as to the national emergency, belie the "two co-equal authorities" argument pressed by the government in opposing certiorari. (Opp. Br. p. 12) These references are intelligible only as the basis upon which the court filled the regulatory void caused by the Commission's default by extending the President's authority beyond Section 305 of the Communications Act to encompass civilian as well as governmental uses of the radio spectrum.

Respectfully submitted,

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